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NO. 82-1246

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

BOSE CORPORATION,
PETITIONER,

v.

CONSUMERS UNION OF UNITED STATES, INC.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S OBJECTION STATING REASONS FOR WITHHOLDING CONSENT TO THE FILING OF BRIEFS AMICUS CURIAE

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Petitioner has withheld consent to the request of James F. McHugh, Esq., to the filing of a brief amicus curiae, purportedly on behalf of members of the American Civil Liberties Union and Civil Liberties Union of Massachusetts because

the requirements of Rule 36.3 for filing such a brief could not be met. Floyd Abrams, Esq., never properly sought petitioner's consent to the filing of a brief amicus curiae, purportedly on behalf of 13 organizations, nor made any attempt to show he could meet the requirements of Rule 36.3.

Rule 36.3 of this Court reads as follows:

> .3. When the consent to the filing of a brief of an amicus curiae in a case before the Court for oral argument is refused by a party to the case, a motion for leave to file, accompanied by the proposed brief, complying with the 30-page limit, may be presented to the Court. No such motion shall be received unless submitted within the time allowed for the filing of an amicus brief on written consent. The motion shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the

> disposition of the case; and it shall in no event exceed five pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

Neither the letter sent to us by Attorney McHugh requesting consent[1], nor either motion, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be,

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[1]Mr. Abrams did not send us a letter requesting consent. On June 30, 1983, a telephone caller identifying himself as Ken Meister of Cahill, Gordon and Reindel, who could not identify all the parties for whom consent was sought, promised to send us a letter requesting consent, identifying all the parties and stating the reasons why filing a brief amicus curiae was proper. We never received any letter from any lawyer in Cahill, Gordon & Reindel and did not receive the Abrams motion until July 18, 1983. The telephone caller told us that these motions [for leave to file brief amicus curiae] were "automatically granted" by the Court, and he was requesting petitioner's consent to filing only as a "courtesy." The statement in the Abrams motion, p. II, that "consent of the petitioner, Bose Corporation, has been requested and refused," is at best misleading.

presented by the parties. While the McHugh motion states that the American Civil Liberties Union has over 250,000 members and the Civil Liberties Union of Massachusetts has approximately 9,500 members, it does not and cannot allege that the views in the amicus curiae brief represent the common interest of all, or even most of these members, as distinguished from the interest of those members who oppose petitioner's views. Since Rule 36.3 conditions the issuance of an order permitting a nongovernmental interest to file an amicus curiae brief upon showing both an interest and the inadequacy of presentation of relevant law and fact issues by the parties, we submit there are no grounds for granting either motion.

There is no excuse for this failure to comply with Rule 36.3 because we

expressly stated to Attorney McHugh in our letter of July 6, that we would withhold consent until he made a proper showing under Rule 36.3. And surely Attorney Abrams, the first listed partner in a firm of 49 partners, IV MARTINDALE-HUBBELL LAW DIRECTORY 1214B (1983), must have known of the requirements of Rule 36.3. In this letter to Attorney McHugh we stated that we had no opposition to his assisting respondent in the preparation of its brief.

In his letter of June 30, 1960, requesting our consent, Attorney McHugh advanced as the sole basis for filing:

> ACLU and CLUM desire to file the brief just described because they believe that the issues raised by this case are profoundly important, reach far beyond the confines of a dispute, however important, between two private litigants and reach far beyond questions of proper interpretation of the Federal Rules of Civil

Procedure. Moreover, my clients believe that the question whether, and to what extent, a reviewing court can make for itself an independent constitutional judgment on the facts of the case which involves rights protected by the First Amendment is a question which affects all cases involving rights that Amendment protects and is not a question which solely affects the proper scope of review in libel cases.

My clients also believe that the United States Court of Appeals for the First Circuit correctly applied the proper standard of review and reached the correct result in this case after doing so. A contrary result, in their judgment, would have a chilling effect on free and open discussion of a wide range of matters of public concern.[2]

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[2]Neither the McHugh nor the Abrams motions made any attempt to comply with Rule 36.3. The McHugh motion concluded:

> In sum, *amici* believe that resolution of the "procedural" issues riding on the surface of this case can have very important consequences for the substantive First Amendment rights those procedural issues concern. To present the foregoing views in this important First Amendment case, ACLU and CLUM respectfully move for leave to file the attached brief as *amici curiae*.

We immediately recognized that the stated reasoning was insufficient under Rule 36.3. In addition we doubted that

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Second and third unnumbered pages.

The Abrams motion advanced as the sole basis for filing:

> The movants seek to submit a brief *amici curiae* with this Court because they share a common interest in preserving and exercising first Amendment rights held protected by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and a common concern that reversal by this Court of the judgment of the Court of Appeals would imperil those rights. The *amici* believe that those rights would be threatened by a rule of law that would subject those who describe, review, rate, evaluate and criticize the products, services, performance and activities of others to standards of verbal accuracy that are as impossible to articulate as they are to meet. In addition, in light of the nature of the constitutional issues at stake, the complexity of the subjective judgments involved in these cases-including questions of subjective intent-and the exacting standard of proof to be met, independent appellate review of the evidentiary record is, the movants believe, essential to protect both the

Attorney McHugh would represent the interest of the members of ACLU and MCLU.

In his letter of June 30, 1983, requesting consent and refusing to send us a copy of his proposed brief for review, Attorney McHugh said, "As I explained to you, I am not comfortable with the idea of sending to you a document which still is in an evolutionary stage. In the event that it is possible to send to you the completed document before the filing deadline, I shall do so."

When we telephoned Attorney McHugh on July 6, 1983, we were informed that he was on vacation and would not return for two weeks. His associate, Attorney Serene, returned our call and told us that the

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constitutional interests at stake and the integrity of the process of constitutional adjudication. P. II.

brief had been completed and was at the printers. A brief at the printers is hardly "a document which still is in the evolutionary stage." Attorney Serene declined to furnish us with a copy of the proposed brief.

We requested Attorney Serene to supply us with a copy of the bylaws and constitutions of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts and the minutes or any other records relating to the decision to file a brief in support of respondent. We told Attorney Serene that we doubted it was in the interest of members of these organizations to oppose the position of petitioner because the "clearly erroneous" standard of review, which petitioner supports, is a two-edged sword, and rejecting this rule might well result in results

opposed to the interest of the members of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts. See *Rogers v. Lodge*, __ U.S. __, 73 L.Ed. 2d 1012, 1021 (1982) and Annot., 72 L.Ed. 2d 890 (1983).

That recent annotation includes the following comment:

> COMMENT: Noting that the scope of appellate fact review continues to widen, one Federal District Court judge has observed that an important factor underlying the expansion of appellate court power is the avoidance of FRCP 52(a) or the circumvention of it by ever-changing interpretations. The judge points out that the appellate courts have failed increasingly to accord to the trial court's findings of fact the respect and deference envisioned by the clearly erroneous rule. The commentator notes that although purporting to pay homage to the clearly erroneous rule, appellate courts have become less reticent to substitute their view of the evidence for that of the trial court to "do justice." Nagle, The Ever Widening Scope of Fact Review in Federal Appellate Courts - Is the

"Clearly Erroneous Rule" Being Avoided? 59 Wash U LQ 409 (1981). *Id.* 894.

If petitioner consented to the filing of a brief opposing its position, purportedly representing the interest of all ACLU and CLUM members, petitioner would in effect be lending support to views against not only its interest, but also against what petitioner believes to be the interest of the people of the United States. Moreover, we would be misleading this Court into believing that the views in the amicus curiae brief represent the interest of the overwhelming majority of ACLU and CLUM members when we submit that many, if not all, members agree with petitioner's views.

The refusal to supply us with any records relating to the decision to file a brief in support of respondent reinforces

our doubts that the McHugh brief truly represents the interest of ACLU and CLUM members genuinely interested in traditional concepts of fair play and substantial justice through following procedural due process required by the Fifth Amendment and embodied in the "clearly erroneous" standard of Rule 52(a), as distinguished from the interest of those attorneys advocating a constitutional right to lie under the First Amendment. Attorney McHugh and his firm represent the Boston Globe. See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583(1st Cir. 1980).

On April 15, 1983, Ira Glasser, Executive Director of the American Civil Liberties Union since October of 1978 testified as follows:

Q. Is there any connection with

the American Civil Liberties Union and the Consumers Union?

A. No.

Q. There is none whatsoever?

A. No.

Q. Is there an endowed fellowship of the union called the Karpatkin Fellowship.

A. Yes.

Q. Who is the Karpatkin who is referred to in that title?

A. Marvin Karpatkin. It is not endowed, however,

Q. May I ask why it is called the Karpatkin fellowship?

A. Yes, it is in memory of Marvin Karpatkin, who was formally [sic] General Counsel and Member of the Board.

MR. POLLET: You have in the past gone on at length about the activities of Mr. Karpatkin.

I would like to say on the record that I find your behavior here as scandelous [sic], loathsome, and beyond contempt.

> Q. My next question to you is are you aware of the fact that Mrs. Rhoda Karpatkin is the Executive Director of the Consumers Union?
>
> A. Yes. Deposition of a Non-Party Witness, American Civil Liberties Union, by Ira Glasser, taken by plaintiff pursuant to subpoena, pp. 8-9, April 15, 1983). *Cranberg v. Consumers Union of U. S., Inc.* (W.D. Tex., Austin Div. Cause No. A-81-CA-496).

Both Mr. and Mrs. Karpatkin were members of the law firm representing respondent. See *Rose Corp. v. Consumers Union of United States, Inc.*, 181 U.S.P.Q. (BNA) 543 (D. Mass. 1974). Rhoda H. Karpatkin, Esq., respondent's executive director, IV MARTINDALE-HUBBELL LAW DIRECTORY 510 (1983), has been a member of the Academic Freedom Committee of the American Civil Liberties Union since 1973. 1 WHO'S WHO IN AMERICA 1747 (1982-83 ed.). We submit that the McHugh brief is to advance the private interest of Attorney Karpatkin as

executive director of respondent in covering up the willful misrepresentation of test results by its engineers published in respondent's magazine as distinguished from the interest of ACLU and CLUM members in promoting civil liberties.

We don't see how "resolution of the 'procedural' issues riding on the surface of this case . . . [having] very important consequences for the substantive First Amendment rights those procedural issues concern," McHugh Motion, second unnumbered page, or "a common concern [by the 13 amici represented by Attorney Abrams] that reversal by this Court of the judgment of the Court of Appeals would imperil . . . [First Amendment] rights," Abrams Motion p. II, can bear on whether the parties will adequately present questions of law or fact relevant to the disposition of

this case. The question for consideration under Rule 36.3 is whether these issues will be adequately presented by the parties, not whether the lawyer leaders of what are represented as a "non-partisan organization" and joined-together media organizations should be able to influence the outcome of the litigation by echoing the views of one of the parties. And when the attorneys of record file motions without regard to Rule 36.3 and act so as to place a serious question as to whether they obscure rather than expound the views of the members, petitioner doubts that a brief endorsed by these attorneys can be relied upon by the Court as an aid to resolving the important constitutional, procedural and equitable issues presented for decision in this case.

Regardless of how other lawyers feel about the substantive issues in this case, we submit that the overwhelming majority of lawyers would agree that it is at best unwise, and probably improper, for attorneys for a "non-partisan organization" or a partisan organization to use that organization in support of views of one group of its members and oppose the views of a different group of its members by supporting one private litigant and opposing another. By approving the filing of a brief supporting respondent, the leaders have authorized using the dues of its members to oppose a position consistent with traditional concepts of fair play and substantial justice urged by petitioner that when followed advance civil liberties and responsible journalism.

On August 1, 1983, amendments to the

Federal Rules of Civil Procedure take effect pursuant to the order of this Court dated April 28, 1983. These rules include provisions placing greater responsibility upon attorneys. For example, FED. R. CIV. P. 11 headed "Signings of pleadings, motions, and other papers; sanctions" now provides, "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of

litigation." While this Court has no such rule, the deliberate violation of Rule 36.3 evident in the McHugh and Abrams motions is reason enough for denying these motions.

Attorney Abrams did not even properly seek petitioner's consent. "Counsel for an *amicus curiae* should address a letter to the attorney for each party, requesting consent to the filing of an *amicus* brief and stating whatever reasons may be deemed appropriate." R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 723 n.33 (5th ed. 1978). When the only effort to seek consent was by a telephone caller who could not even identify all the amici[3]

[3]The Abrams motion fails to set forth compliance with bylaws of the five associations, societies and committees he purportedly represents authorizing him to represent the interest of all members. We submit that many, if not all, of these members support the rules of fair procedure required by the Fifth Amendment

purportedly represented by Attorney Abrams and promised to send a letter properly requesting consent with "whatever reasons may be deemed appropriate," but sent no letter, and petitioner agreed to consider the request after reviewing the letter, it is at best misleading to represent to this Court that "consent . . . has been requested and refused." Abrams Motion p. II.

The callous disregard for compliance with Rule 36.3 conveyed by this telephone caller in saying that these motions are "automatically granted," and he was requesting consent to filing from petitioner solely "as a matter of courtesy," cannot be condoned. If EQUAL JUSTICE UNDER LAW emblazoned above the portals of this Court means

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and FED. R. CIV. P. 52(a) urged by petitioner.

anything, it is that lawyers from the large metropolitan law firms, like sole practitioners, are not excused from compliance with the rules of this Court. And when they file motions in defiance of Rule 36.3, equal justice requires denial of their motions.

> The Department of Justice frowns upon the filing by amici with merely an academic interest at one extreme, or those who merely wish to engage in propaganda on the other. Consent is given 'where the applicant has a concrete, substantial interest in the decision of the case, and the proposed brief would assist the Court by presenting relevant arguments or materials which would not otherwise be submitted." *Id.* 728 n.36.

Neither the McHugh nor the Abrams motions make such a showing, nor did Attorneys McHugh or Abrams make any effort to make such a showing to petitioner before filing their

motions.

We recognize our responsibility to not withhold consent unreasonably, *On Lee v. United States*, 343 U.S. 924 (1952). But where, as here, the attorneys seeking consent deliberately refuse to make available to us information necessary to determine whether "the proposed brief would assist the Court by presenting relevant arguments or materials which would not otherwise be submitted," R. STERN & E. GRESSMAN, *supra* 728 n.36, our responsibility to the Court requires withholding consent.

We submit that the McHugh and Abrams motions were submitted for the improper purpose of taking unfair advantage of the accepted practice "(dictated largely by the exigencies of time) . . . to append the proposed *amicus* brief to the motion

for leave to file such brief, binding them in a single cover, a denial of the motion is not too disastrous; in passing upon the motion, the Justices or their clerks will see and may well read the brief to the same extent that they would if the motion were granted." *Id.* 496-97.

In guiding lawyers more than two decades ago a distinguished practitioner before this Court said:

> No doubt the soundest view is that the filing of a brief *amicus curiae* on behalf of a client should be seriously considered only when such filing is plainly necessary to protect that client's interest, but not when the only justification for such a course would be the desire to add a "me too," or even a conviction that "anything-you-can-say-I-can-say-better."
>
> A good yardstick for differentiating between the two situations is the Supreme Court rule that sets forth the showing required to be made in a motion for leave to file a

> brief amicus curiae, namely, "facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties."
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> . . . [A] brief *amicus curiae* should be filed on behalf of one not a party to the litigation only when it can reasonably be demonstrated that the governing considerations have not been, or will not be, adequately presented by the litigants. If no such demonstration can fairly be made, counsel is better advised simply to pass on to the lawyers actually in the case his pet citations bearing on the issues involved. F. WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 271-72 (BNA Inc. Washington 1961).

We submit that the remarks of Mr. Justice Frankfurter at the proceedings in his honor on April 30, 1960, in Cambridge concerning "the responsibility of the Bar, as inadequate advisors of amenable clients, for many . . . evils" are appropriate here. He said:

> Again and again I say to myself, and sometimes to a hospitable ear either to the left or right of me,

"why didn't this lawyer, in advising his client, consider beyond construction whether it is right or wise?"

Respectfully submitted,

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